No. 123123

In the Supreme Court of Illinois

LMP SERVICES, INC.,

Plaintiff-Appellant,

v.

THE CITY OF CHICAGO,

Defendant-Appellee.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 16-3390
There Heard on Appeal from the
Circuit Court of Cook County, Illinois
County Department, Chancery Division, No. 12 CH 41235
The Honorable Anna H. Demacopolous, Judge Presiding

BRIEF OF PLAINTIFF-APPELLANT LMP SERVICES, INC.

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Oral Argument Requested

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This action challenges two provisions of Chicago's regulation of mobile food vehicles (colloquially known as "food trucks").[1] One is Chicago's 200-foot rule, which prohibits food trucks from operating on public or private property within 200 feet of the main entrance of any business that prepares and serves food to the public. Municipal Code of Chicago ("MCC") § 7-38-115(f). The other is Chicago's GPS requirement, which forces food trucks to install and use Global Positioning System (GPS) devices that transmit their whereabouts to "any service that has a publicly-accessible application programming interface (API)." MCC § 7-38-115(l).

Plaintiff LMP Services, Inc. ("LMP") and its owner, Laura Pekarik, have a food truck called "Cupcakes for Courage." Together with Greg Burke and Kristin Casper, owners of the "Schnitzel King" food truck,[2] LMP sued, alleging that the 200-foot rule violates due process and equal protection under Article I, Section 2 of the Illinois Constitution, and that the GPS requirement violates their right to be free from unreasonable searches under Article I, Section 6. They sought a declaration that the two provisions violate the Illinois Constitution, an injunction preventing their further enforcement, and an award of nominal damages along with Plaintiffs' costs and expenses.

[1] Throughout this brief, the term "food trucks" should be read as synonymous with "mobile food vehicles" as defined by Section 4-8-010 of the Municipal Code of Chicago.

[2] Greg Burke and Kristin Casper were forced to close Schnitzel King in 2014, in part because the 200-foot rule made it too difficult to operate in Chicago. The two were voluntarily dismissed from this action and subsequently left Illinois to seek other employment.

Plaintiffs amended their Complaint, and Chicago, in turn, moved to dismiss under Illinois Code of Civil Procedure Section 2-615. Although the circuit court dismissed Plaintiffs' equal protection claim, it allowed their due process and searches, seizures, privacy and interceptions claims to proceed. Following discovery, the parties cross-moved for summary judgment. On December 5, 2016, the circuit court granted Chicago's motion for summary judgment and denied LMP's motion.

LMP timely appealed to the First Judicial District, which on December 18, 2017, affirmed the circuit court's decision. On January 11, 2018, Justice Burke extended LMP's time to submit a petition for leave to appeal. Pursuant to that order, LMP petitioned for leave to appeal to this Court on February 16, 2018. This Court allowed an appeal on May 30, 2018.

No questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the appellate court erred in upholding Chicago's 200-foot rule on the basis that the police power may be used to blatantly discriminate against one business for the express purpose of financially benefitting that business's would-be competitors.
2. Whether, in light of the facts and circumstances in evidence, the 200-foot rule reasonably furthers Chicago's non-protectionist rationales of mitigating pedestrian congestion and spreading retail food options.
3. Whether the appellate court erred in holding that Chicago's GPS requirement is not a search under Article I, Section 6.
4. Whether Chicago's GPS requirement is a reasonable search although it has never been used for its ostensible purpose and requires that LMP's location history be available to anyone who requests access to it.

JURISDICTION

On May 30, 2018, this Court allowed LMP's petition for leave to appeal. Thus, jurisdiction in this Court lies under Illinois Supreme Court Rule 315.

STATUTES INVOLVED

Municipal Code of Chicago § 7-38-115(f)

No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant

which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m. Restaurant, for purposes of this section, means any public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms and sandwich shops.

Municipal Code of Chicago § 7-38-115(l)

Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device.

Illinois Constitution, Article I, Section 2

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Illinois Constitution, Article I, Section 6

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF FACTS

Plaintiff LMP Services, Inc. is a closely held Illinois corporation based in Elmhurst. A.211.[3] Its owner, Laura Pekarik, operates a food truck called "Cupcakes for Courage." A.212. Cupcakes for Courage is a licensed "mobile food dispenser" that, since June 2011, has sold cupcakes on both public and private property throughout Chicago. *Id.* Laura named the food truck Cupcakes for Courage in honor of her sister Kathryn, who made cupcakes with Laura while recovering from cancer, and Laura donates a portion of the truck's proceeds to cancer charities.[4]

Chicago has numerous rules that apply to food trucks. Most are straightforward: Food trucks cannot park and operate within 20 feet of a crosswalk, within 30 feet of a stop sign or traffic signal, or directly outside a

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[3] The record on appeal consists of 23 volumes. Volumes 1 through 21 are the common law record, cited as "C.__." Volumes 22 through 23 contain transcripts of circuit court proceedings, cited as "__Tr.__," where the initial blank contains its volume number. The Separate Appendix of Plaintiff-Appellant LMP Services, Inc. is cited as "A.__."

[4] *About*, Courageous Bakery & Café, https://courageousbakery.com/about/.

theater's doors. MCC §§ 7-38-115(e)(i)-(ii), 9-64-100(h). But two rules are unusual and onerous. One is the "200-foot rule," a rule which the Mayor says "protects traditional restaurants" by keeping food trucks from operating within 200 feet of the principal entrance of any business that prepares and sells food to the public. A.57. The second requires that food trucks permanently install and operate Global Positioning System (GPS) devices. A.61. Meant to help enforce the 200-foot rule, these devices send a truck's location data to a private company every five minutes a truck is operating. And that company, in turn, must both give Chicago access to that data upon request and provide a publicly accessible application programming interface (API), a "door" that allows the public to obtain a truck's current and historical location data via a computer program. A.167, 304.

A. The History of the 200-Foot Rule

The 200-foot rule is not Chicago's first attempt to discriminate against food trucks in favor of their brick-and-mortar competitors. In the 1980s, Municipal Code Section 130-4.12(d) forbade food trucks from operating "within two hundred feet . . . o[f] a place of business which deals in like or similar commodities such as are sold by the mobile unit." A.51. In a 1986 lawsuit brought by food trucks serving construction workers, the Cook County Circuit Court struck down 130-4.12(d) under Article I, Section 2, the same constitutional provision invoked here. A.51, C.1520.

Five years later, in 1991, Chicago re-enacted its 200-foot rule, this time forbidding food trucks from operating within 200 feet of *any* ground-floor restaurant. A.52–53. But unlike Section 130-4.12(d), that re-enactment exempted food trucks serving "food and drink to persons engaged in construction" from the rule. *Id*.

B. Chicago Enacts a New Vending Ordinance

On June 27, 2012, Mayor Rahm Emanuel and seven aldermen introduced Ordinance 2012-4489, A.56, which for the first time required food-truck operators to install GPS tracking devices. A.61. The Mayor's Office stated that, under the GPS requirement, "[d]ata on food truck locations will be available online to the public. Food truck operators will be required to use mounted GPS devices in each truck so that the City and consumers can follow their locations." A.117.

The ordinance also maintained the 200-foot rule, while greatly increasing the fines for violating it. Before, Chicago fined trucks $250.00 to $500.00 for violating the rule. A.60. The ordinance quadrupled those fines to $1,000–$2,000 per violation. A.60-61. Those heightened fines underscored the rule's protectionist purpose. In a press release, for instance, the Mayor stated that the ordinance "protects traditional restaurants." A.114. Alderman Tom Tunney—owner of four Ann Sathers restaurants and former chairman of the Illinois Restaurant Association—echoed those comments, arguing in favor of the ordinance on the explicit grounds that it "regulates

competition" between restaurants and food trucks. *Id.* Alderman Brendan Reilly, who represents an area of Chicago with many restaurants, likewise stated that "we want to make sure that we are guarding those folks who've made substantial investments in the City of Chicago by buying restaurants." A.66–67. And at the July 25, 2012 vote enacting the ordinance, Alderman Walter Burnett, Jr. said that "we don't want to hurt the brick and mortar restaurants." A.68.

Following the ordinance's passage, the Chicago Board of Health enacted GPS tracking regulations, which it subsequently amended. Under those amended regulations, a GPS device must be an "active" device that sends real-time location data to a GPS service provider at least once every five minutes. A.166. The device must be sending that data whenever the truck is vending food, is otherwise open to the public, or is being serviced at a commissary. *Id.* Officials may request a truck's location data for numerous reasons, including to "establish[] compliance with" the 200-foot rule. *Id.* That data must include both the truck's current location and at least six months of historical information. A.166–67. And the regulations, like the ordinance, require GPS service providers to provide "[a]n application programming interface (API) that is available to the general public." A.167.

C. LMP Challenges the 200-Foot Rule and GPS Tracking Scheme

On November 14, 2012, LMP joined with Greg Burke and Kristin Casper and sued in Cook County Circuit Court, contending that the 200-foot

rule violated the Due Process and Equal Protection Clauses of Article I, Section 2 and that the GPS tracking requirement violated Article I, Section 6. C.3–24. Following amendment, C.194–230, Chicago moved to dismiss. C.232–35. Although the circuit court dismissed Plaintiffs' equal protection claim, it allowed their due process and searches and seizures claims to proceed. C.382.

Chicago answered and, following discovery, the parties each moved for summary judgment. On December 5, 2016, the circuit court granted Chicago's motion for summary judgment, holding that the rule was a legitimate means of "balancing the interest" between food trucks and restaurants and mitigating pedestrian congestion, while the GPS requirement was a reasonable warrantless search. A.3–21. LMP appealed this ruling to the Appellate Court, First Judicial District, on December 28, 2016. A.22.

On December 18, 2017, the appellate court affirmed the circuit court's decision. A.451. With respect to the 200-foot rule, the appellate court noted that brick-and-mortar restaurants pay property taxes and other associated fees that it felt exceeded similar payments made by food-truck owners. A.463, ¶ 32. Because of that, it held that Chicago could "protect those" restaurants from competition by mobile vendors; accordingly, it refrained from considering Chicago's post-hoc, non-protectionist rationales for the rule. A.471. The appellate court also held that the GPS scheme did not constitute

a "search" both because LMP had to install the device itself, A.473, ¶ 52, and because GPS tracking was a condition of licensure. A.474–75, ¶ 56. LMP petitioned for leave to appeal to this Court, which this Court granted on May 30, 2018.

STANDARD OF REVIEW

An appeal arising from a summary judgment order is decided under the de novo standard of review. *Perry v. Dep't of Fin. & Prof'l Regulation*, 2018 IL 122349, ¶ 30 (citing *Stern v. Wheaton–Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 404 (2009)).

ARGUMENT

Chicago enacted its 200-foot rule to "regulate[] competition," A.60–61, and to ensure "the viability and economic activity of Chicago's restaurants." C.1626. It protects restaurants by prohibiting food trucks, whether on public or private property, from operating within 200 feet of a restaurant's front doors. A.51–52. If a food truck dares to compete within that radius, it can be fined up to $2,000, A.60–61, thirty times more than the fine for parking in an intersection.

Using the police power to burden one business in order to financially benefit its competitors violates the Illinois Constitution. For over a century, Illinois courts have repeatedly struck down anti-competitive zoning decisions, occupational licensing laws and, most relevant here, proximity restrictions like the 200-foot rule. The appellate court, however, held a government may ignore that constitutional history and "protect brick-and-mortar restaurants,"

A.463, if the government can claim that one competitor might pay more in taxes than another. That conclusion lacks any legal support. And to credit it, to say that governments may snuff out one person's trade in order to reap the "economic by-products" of his or her competitors, would swallow the rule against protectionism.

The appellate court's sole basis for upholding the 200-foot rule was its conclusion that protectionism is permissible as long as the protected class pays taxes, and rejecting that conclusion is sufficient to reverse. To the extent the Court examines alternative bases for affirming, however, none exist. Discovery confirmed that the rule's only plausible explanation is the one Chicago officials have consistently offered: protectionism. Because the 200-foot rule furthers no legitimate interest, this Court should reverse and declare that it violates Article I, Section 2.

To help enforce the 200-foot rule, Chicago requires food trucks to install and operate GPS tracking devices that enable it to monitor a food truck's movements for months on end. This is a warrantless search under the Fourth Amendment and Article I, Section 6. The appellate court said, though, that because food trucks install the devices themselves as a condition of licensure, no search has taken place. A.474–75. Chicago cannot force people to surrender their rights to be free from unreasonable searches in order to work. And it cannot evade constitutional scrutiny by ordering people to install surveillance equipment rather than doing the job itself.

Chicago's GPS scheme is therefore a search, and an unreasonable one at that. Both the Fourth Amendment and Article I, Section 6 require that warrantless inspections be necessary. Chicago has claimed GPS helps facilitate health inspections, but it admitted *never* using GPS data for that purpose. The requirement is also overbroad in that Chicago requires GPS information be shared with anyone who asks for it. Because the GPS tracking requirement is an unreasonable warrantless search, LMP asks this Court to declare that it violates the Illinois Constitution.

I. The Appellate Court Was Wrong to Hold That Protecting Restaurants from Food Truck Competition Is a Legitimate Government Interest.

The parties, as well as the court below, all agree on one thing: Chicago designed its 200-foot rule to protect restaurants from competition by mobile vendors. When Chicago re-enacted the rule in 1991, the Mayor's press secretary defended it on that basis.[5] It was similarly justified in 2012: Mayor Emanuel said the rule "protects traditional restaurants." A.114. Alderman Tom Tunney, former chairman of the Illinois Restaurant Association, said the rule "regulates competition" between restaurants and food trucks. A.68. Aldermen Reilly and Burnett made similar statements. A.66–68. And throughout this case, Chicago's principal argument has been that the rule "preserv[es] the viability and economic activity of Chicago's

[5] Janet Ginsburg, C*ity Cracks Down on Mobile Food Vendors*, CHI. TRIB. (July 27, 1991), http://articles.chicagotribune.com/1991-07-27/news/9103230333_1_mobile-food-vendors-parking-food-truck.

restaurants." C.1626.

Using the police power to burden one business to increase the "economic activity" of its competitors violates decades of Illinois jurisprudence. Again and again, Illinois courts have held that "[c]ompetition should be managed by market forces, not by local government, which should not be placed in the position of deciding whether more (or less) competition is a good thing." *Bossman v. Vill. of Riverton*, 291 Ill. App. 3d 769, 777 (4th Dist. 1997). This basic tenet of Illinois jurisprudence led this Court in *Chicago Title & Trust, Co. v. Village of Lombard*, 19 Ill. 2d 98 (1960) to invalidate a proximity restriction on all fours with the one in this case.

The appellate court broke with this decades-long string of precedent in upholding the 200-foot rule. It declared that "[w]e reject LMP's assertion that the City may not protect brick-and-mortar restaurants." A.463, ¶ 32. Leaning heavily on dicta from *Napleton v. Village of Hinsdale,* 229 Ill. 2d 296 (2008)—a zoning case that has nothing to do with protectionism—the court held that local governments could "protect those in the food service industry who pay and support the City's property tax base from those food businesses that do not," A.463, ¶ 32, by blatantly discriminating against the latter in favor of the former.

This Court should recognize the appellate court's holding as an unsupportable deviation from an unbroken line of cases. In Part A, LMP articulates how, in both *Chicago Title & Trust* and numerous other cases,

Illinois courts have rejected the notion that governments may discriminate against X in order to benefit Y. In Part B, LMP shows how courts in other states have reached the same conclusion. And in Part C, LMP explains why the appellate court erred in holding that *Napleton* silently overthrew decades of Illinois jurisprudence.

A. Illinois Courts Have Repeatedly Held That Protecting Businesses From Competition Is Not a Legitimate Use of the Police Power.

For over a century, Illinois courts have held that state and local governments may not use the police power to suppress competition and thereby financially benefit a preferred private party. *See, e.g.*, *City of Peoria v. Gugenheim*, 61 Ill. App. 374, 380 (2d Dist. 1895) (invalidating vending ordinance as "unjust and oppressive" after concluding that "its aim and intent was to prevent competition with the city merchants by transient merchants, to the detriment of the public generally"). This principle has been reaffirmed at least a dozen times since, in cases involving zoning laws, occupational licensing, and proximity restrictions like Chicago's 200-foot rule.

The protectionist impulse often arises in zoning cases, with local governments prohibiting new businesses out of fear they will compete with existing establishments. In *Lazarus v. Village of Northbrook*, for instance, plaintiffs bought land to build a new hospital. 31 Ill. 2d 146 (1964). Despite being a permissible use, the village board of trustees refused permission to build, in part because a new hospital might compete with nearby facilities

and hurt them financially. The plaintiffs sued, alleging in part that the board's actions were arbitrary and unreasonable.

This Court agreed, holding that the board's denial had no "real and substantial relation to the public health, safety, morals or general welfare." *Id*. at 151–52. The project was compatible with the area, and similar facilities existed nearby. This Court additionally rejected the village's protectionist impulse, holding that "the fear of potential economic disadvantage to other hospitals is not a permissible consideration." *Id*. at 152. Similar cases abound. *E.g.*, *Suburban Ready-Mix Corp. v. Vill. of Wheeling*, 25 Ill. 2d 548, 550 (1962) (invalidating ordinance prohibiting new concrete plants after finding that it "exclude[d] from the village all ready-mix concrete plants except that of the Meyer company"); *Cosmopolitan Nat'l Bank v. Vill. of Niles*, 118 Ill. App. 3d 87, 91 (1st Dist. 1983) (reversing denial of permit to build new restaurant near four existing restaurants on basis of potential competition); *Exch. Nat'l Bank of Chi. v. Vill. of Skokie*, 86 Ill. App. 2d 12, 20–21 (1st Dist. 1967) (rejecting denial of special-use permit for automated carwash and holding that a local government cannot "legislate economic protection for existing businesses against the normal competitive factors which are basic to our economic system").

Illinois courts have also frequently dealt with anti-competitive occupational licensing schemes that empower incumbents to shield their profession from new entrants. In *Church v. State*, for instance, the law

required would-be security alarm installers to work for an existing contractor for three of the previous five years. 164 Ill. 2d 153, 159 (1995). This Court examined if the restriction had a "definite and reasonable relationship" to protecting the public from incompetent contractors. *Id.* at 165. This Court concluded that it did not, holding the restriction unconstitutional "because it grants members of the private alarm contracting trade monopolistic control over individuals who wish to gain entrance into the field." *Id.* at 168. *Church* is no anomaly; for decades, Illinois courts have struck down similar anti-competitive and monopolistic trade restrictions. *E.g.*, *People v. Johnson*, 68 Ill. 2d 441 (1977) (plumbing); *Ill. Hosp. Serv., Inc. v. Gerber*, 18 Ill. 2d 531 (1960) (insurance); *Schroeder v. Binks*, 415 Ill. 192 (1953) (plumbing); *People v. Brown*, 407 Ill. 565 (1950) (same); *Johnson v. Ill. Dep't of Prof'l Regulation*, 308 Ill. App. 3d 508, 513–14 (4th Dist. 1999) (private detectives).

This principle against protectionism has also arisen in challenges to proximity restrictions like the 200-foot rule. In *Chicago Title & Trust v. Village of Lombard*, this Court scrutinized a proximity restriction that prevented new gas stations from opening within 650 feet of existing stations. 19 Ill. 2d 98, 100 (1960). After the plaintiffs negated Lombard's post-hoc justifications of fire safety and congestion remediation, this Court turned to the restriction's real purpose: protecting existing gas stations from competition. This Court rejected the legitimacy of that purpose, holding that the proximity restriction inhibited competition and "tend[ed] to promote

monopoly." *Id*. at 107. Because protectionism is illegitimate, this Court held that it could not find "a rational basis for the restriction," and declared Lombard's 650-foot rule unreasonable and unconstitutional. *Id*.

Twenty-six years later, the Cook County Circuit Court invalidated a previous version of Chicago's 200-foot rule in a challenge brought by a vending company that principally served construction workers. *Thunderbird Catering Co. v. City of Chicago*, No. 83 L 52921 (Cook Cty. Cir. Ct. Oct. 15, 1986). Though the order merely said the rule was "vague and unenforceable," the *Chicago Tribune* contemporaneously reported that the court upheld the argument "that the provision was an illegal infringement on competition and was not needed for traffic safety because vendors are required to park legally." *Vendor Restriction Rolls Away*, CHI. TRIB., Oct. 16, 1986, 1986 WLNR 1202339. Five years later, Chicago enacted its current version of the 200-foot rule and added a brand-new exemption for food trucks serving construction workers. A.51–53.

The appellate court cast these decisions to the side, either because they involved non-home-rule municipalities or did not involve use of the right-of-way. Below, LMP explains that these cases are not distinguishable, and that the Illinois Constitution *always* requires that the police power be used for a public purpose, no matter who exercises that power or how it is deployed.

1. *Chicago Title & Trust* and other cases remain good law following the establishment of home-rule authority in the 1970 Constitution.

Cases like *Chicago Title & Trust* and *Exchange National Bank of Chicago* demonstrate that local governments may not use the police power to shield businesses from competition. But the appellate court cast many of those cases to the side because they were decided before 1970 and involved non-home-rule units. Pointing to this Court's decision in *Triple A Services*, it said that the "home rule provision [in the 1970 Constitution] dramatically altered Chicago's authority, and it can now act with the 'same powers as the sovereign.'" A.468, ¶ 42 (quoting *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989)).

But, the advent of home-rule authority makes no difference. None of the cases cited above turned on the fact that the defendant locality had not been delegated authority to regulate. Instead, they all turned on the same question presented here: whether the Illinois Constitution permits the police power to be used purely for protectionism.

In any event, Illinois courts use the same analysis to determine whether a law is constitutional, no matter whether the law was enacted by a home-rule authority or not. For a non-home-rule municipality, there are two steps. First, the court must determine if the General Assembly has delegated authority to exercise the police power to the municipality. If it has, the court proceeds to the second step of determining if the municipality's exercise of that power has a rational basis; that is, whether it is a reasonable means of

furthering some legitimate government interest.

Home-rule authority simply eliminates that first step, since home-rule municipalities like Chicago derive their police power directly from the Illinois Constitution. Il. Const. art. VII, § 6(a). But they must still proceed to the second step, since courts must always evaluate if the government's action has a rational basis. *See, e.g.*, *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 33 (2003) (declaring statute invalid under rational-basis test because it "had an artificially narrow focus, designed primarily to confer a benefit on a particular group, rather than to promote the general welfare").

In other words, the reasonableness of municipal ordinances is judged by the same constitutional standard, no matter whether those municipalities are home-rule authorities or are exercising power delegated to them by the legislature. This Court said as much in *City of Carbondale v. Brewster*, 78 Ill. 2d 111, 115 (1979), where it explained that enactments by the state and home-rule authorities must "bear a reasonable relationship to one of the foregoing interests which is sought to be protected, and the means adopted must constitute a reasonable method to accomplish such objective." The Court then immediately remarked that this same test "also applies to ordinances passed pursuant to legislative authority." *Id.* (citing *Petterson v. City of Naperville*, 9 Ill. 2d 233, 244 (1956)). And in *Petterson*, this Court explained that while "the legislature may, if it sees fit, confer special extraterritorial powers on municipalities," 9 Ill. 2d at 243 (citations omitted),

"[t]he exercise of such extraterritorial powers by a municipality is, of course, always subject to the requirement that the ordinance passed pursuant to legislative authority constitutes a valid exercise of the police power, and bears a reasonable and substantial relation to the public health, safety or general welfare." *Id*. at 243–44.

Chicago Title & Trust followed this familiar two-step process. This Court began its opinion by performing the first step described above, acknowledging that the legislature had given Lombard authority "to regulate the storage of petroleum products, and to locate and regulate the use and construction of garages." 19 Ill. 2d at 103. This Court then turned to the second, constitutional, step. It evaluated the evidence for Lombard's 650-foot proximity restriction and held that it could not find "a rational basis for the restriction." *Id*. at 107. This Court therefore affirmed the lower court's decision holding the ordinance "unconstitutional and void." *Id*. at 100. *Chicago Title & Trust* is on all fours with this case, as are the numerous other cases dismissing protectionism as a legitimate state interest.

2. The fact that vending sometimes takes place on the public way does not absolve the 200-foot rule of constitutional scrutiny.

The appellate court also said *Chicago Title & Trust*, *Exchange National Bank*, *Cosmopolitan National Bank* and other cases were distinguishable because they involved private property. A.469–70. It cited *Triple A Services v. Rice*, *City of Chicago v. Rhine*, and *Good Humor v. Village of Mundelein* as supporting the idea that "LMP and all food trucks have no

constitutional property right to conduct any private business from the streets or sidewalks of Chicago." A.469, ¶ 43. To the appellate court, when a regulation involves a trade conducted on the right of way, the minimum constitutional standard of rationality either withers or falls away altogether.[6]

That is not what these cases say. Instead, they say that the right to practice one's trade must yield to reasonable police power regulations. LMP fully appreciates that point, but the plaintiffs in *Triple A Services*, *Good Humor*, and *Rhine* did not. They felt that they had acquired a property right entitling them to keep vending as they always had, irrespective of any reasonable police-power regulations. They were wrong. *See, e.g.*, *Triple A Servs., Inc. v. Rice*, 131 Ill. 2d 217, 237 (1989) ("Plaintiffs seem to suggest that through long and continued operation of their businesses within the District, they have become vested with some property interest in continuing to do so. We disagree."); *Good Humor Corp. v. Vill. of Mundelein*, 33 Ill. 2d 252, 259 (1965) (rejecting idea that, because plaintiff had operated for 15 years, a ban on vending on public property could not be applied to him); *City of Chicago v. Rhine*, 363 Ill. 619, 625 (1936) (ruling that plaintiff had no "inherent right" to vend despite enactment of reasonable congestion ordinance).

Again, unlike the plaintiffs in *Triple A Services*, *Good Humor*, and *Rhine*, LMP does not claim that it may ignore reasonable health, safety, or

[6] It is important to remember that the 200-foot rule applies on both public and private property throughout all of Chicago.

welfare regulations. But its argument is that the 200-foot rule is *not* a reasonable regulation. Its anti-competitive purpose violates this Court's repeated holdings that the government may only regulate the public way "within reason." *E.g.*, *Vill. of Lake Bluff v. Dalitsch*, 415 Ill. 476, 486 (1953).

Lower Illinois courts have invalidated unreasonable municipal regulations regarding the public way under the rational-basis test. In *City of Evanston v. City of Chicago*, 279 Ill. App. 3d 255 (1st Dist. 1996), for instance, Evanston sued Chicago concerning a divider Chicago erected between the two cities. Although Chicago had home rule, the First District noted "that a municipality's regulatory and police powers over its public streets are subject to a reasonableness limitation." *Id*. at 266 (citing *City of Chicago Heights v. Pub. Serv. Co*., 408 Ill. 604, 608 (1951)). Citing *Triple A Services*, it recognized that Evanston had the burden of demonstrating that Chicago's actions lacked a rational basis. *Id*. It held that Evanston had met that burden by proving that Chicago had conducted no traffic studies regarding the barrier and by presenting evidence that the barrier would not further Chicago's supposed justifications.

As *City of Evanston* demonstrates, the Illinois Constitution *always* constrains government action, whether on public or private property. And it always requires that the government use the police power to further the public interest, not to financially benefit private parties by running off their competition. This is true not only in Illinois but, as the next section shows,

other states throughout the nation.

B. Courts in Other States Have Rejected the Idea That the Police Power Authorizes Governments to Protect Restaurants and Other Brick-and-Mortar Retailers from Vending Competition.

Lazarus, *Church*, and *Chicago Title & Trust* all demonstrate a bedrock rule of Illinois jurisprudence—that the government may not use its police power to shield a business from its competitors. But that rule is not unique to Illinois courts, and in fact courts around the nation have rejected the idea that tax receipts can justify protectionism.

Good Humor Corp. v. City of New York is a perfect example. 290 N.Y. 312 (1943). There, the New York Court of Appeals held that the police "power is not broad enough to prohibit use of the street for a lawful business . . . for the sole purpose of protecting rent payers and taxpayers against competition from others who do not pay rent or taxes." *Id.* at 317.[7] Applying the holding in *Good Humor*, New York courts have held that New York City cannot require vendors to stay 100 feet away from brick-and-mortar businesses selling similar goods (or 250 feet away if the business complains). *Duchein v. Lindsay*, 345 N.Y.S.2d 53, 55–57 (N.Y. App. Div. 1973), *aff'd*, 34 N.Y.2d 636 (1974).

[7] Of course, Chicago's food trucks do pay taxes, including property taxes. All Chicago food trucks must associate with a commissary, MCC § 7-38-138, and therefore pay property tax either by virtue of owning that commissary or by renting space in one. They likewise underwrite the commissaries' electricity use and water and sewer taxes. They pay sales taxes, with the rate for food trucks in Chicago exceeding 11%. And unlike restaurants, food trucks must pay Chicago taxes for the fuel they purchase. *Id.* § 3-52-020.

New Jersey has likewise rejected the idea that cities may discriminate against vendors to enrich brick-and-mortar businesses. In *Fanelli v. City of Trenton*, 135 N.J. 582, 589 (1994), the New Jersey Supreme Court stated that "a municipal prohibition on peddling that serves no purpose other than to protect local businesses from competition is an invalid exercise of a municipality's police power." (citations omitted); *see also Moyant v. Borough of Paramus*, 30 N.J. 528, 545 (1959) (holding in vending case that the police "power cannot . . . be exercised for a purpose to shield the local shopkeepers from lawful competition") (internal quotations and citations omitted). In applying that longstanding norm, a New Jersey court struck down a law preventing vending within 200 feet of businesses with similar merchandise, declaring that "a regulation patently for the benefit of local shopkeepers to prevent competition . . . will not be permitted under the mask of a police regulation." *Mister Softee v. Mayor of Hoboken*, 77 N.J. Super. 354, 367 (N.J. Super. Ct. Law Div. 1962), *overruled on other grounds by Brown v. City of Newark*, 113 N.J. 565, 578 (1989).

California, too, has rejected the appellate court's holding. In *People v. Ala Carte Catering Co.*, for instance, a California court invalidated a Los Angeles rule that kept food trucks from selling within 100 feet of a restaurant. 159 Cal. Rptr. 479 (Cal. Ct. App. 1979). That court, after rejecting Los Angeles' pretextual congestion and spreading retail food options

rationales, invalidated Los Angeles' rule as a "rather naked restraint of trade." *Id.* at 484 (citation omitted).

C. *Napleton* Does Not Justify Chicago's Blatantly Discriminatory Use of the Police Power.

The above-discussed cases from Illinois and other states show that governments may not use the police power to play favorites, to burden X because doing so will aid Y. That principle undergirds this Court's repeated rejection of protectionism and its holding in *Chicago Title & Trust* that Lombard could not constitutionally "promote monopoly" for existing gas stations by preventing new ones from opening within 650 feet.

The appellate court's decision sidestepped that basic principle, concluding that because it felt that a food truck on average pays less in taxes and fees than a restaurant, the government could engage in pure protectionism on behalf of the latter. A.463. The sole Illinois case it cited in support was *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296 (2008), but that decision cannot bear the weight the appellate court would put on it.

Napleton concerned a challenge to a zoning text amendment enacted by the Village of Hinsdale. The village's zoning code established three distinct business districts, each meant to serve a different shopping population (i.e., village residents versus the broader suburban community). Hinsdale commissioned a months-long study to evaluate whether the village should allow new banks and credit unions to open in first-floor retail spaces in those districts. Hinsdale concluded that when a bank or credit union

(which does not generate sales taxes) occupied a first-floor space, that necessarily prevented a sales-tax-generating use from occupying it. So Hinsdale prevented new first-floor banks and credit unions in two of the three districts.

Katherine Napleton, who owned several contiguous parcels of property in one of the affected districts, sued. She complained that Hinsdale's amendment reduced the pool of potential lessees she could attract, and argued that Hinsdale's actions lacked a rational basis. This Court affirmed the dismissal of her complaint, holding that it lacked sufficient factual detail. But it also said that, in any event, the amendment had a rational basis. In its view, Hinsdale's amendment ensured a mix of businesses in the affected districts, and limiting additional banks from locating in first-floor spaces was a reasonable way for Hinsdale to address this "opportunity cost in forgone tax revenue." *Id*. at 321.

Napleton therefore does not stand for the idea that protectionism is legitimate. Instead, it stands for the unremarkable proposition that cities may take into account how much tax revenue a use generates when deciding whether to permit that use in a given zoning district. This sort of math is common, indeed ubiquitous, in zoning determinations: In evaluating a potential zoning change for a specific parcel, for instance, one factor officials consider is "the relative gain to the public as compared to the hardship imposed upon the individual property owner." *La Salle Nat'l Bank of Chi. v.*

Cook Cty., 12 Ill. 2d 40, 47 (1957).

Rather than prohibit new banks from entering the village, Hinsdale used its zoning power to create different rules for different districts based on those districts' purposes. This is common: Zoning officials may recognize that increasing housing density could potentially increase property tax revenue, for instance, but they will weigh that increase against the chance increased density could mean greater service costs. That's why some residential areas have single-family homes, and others have apartment buildings. And it's why Hinsdale said there could be no new first-floor banks in its "Community Business" and "General Business" districts, but continued to allow them in its "Central Business District." The holding of *Napleton* is that communities may constitutionally conduct this type of routine calculus.

The appellate court, by contrast, read *Napleton* as letting municipalities play favorites so long as they point to peoples' relative tax contributions as justification. But that reading ignores the facts of the case. Katherine Napleton was a property owner, not someone whose plans of opening a new bank were stymied by Hinsdale's actions. Hinsdale did not change its zoning to protect existing banks and credit unions from competition by new entrants. Indeed, nothing in *Napleton* even intimates that Hinsdale could amend its zoning code to prevent new banks in order to protect the revenues of existing ones. Such a holding would conflict with numerous holdings that say "the control or restriction of competition is not a

proper or lawful zoning objective." *Cosmopolitan Nat'l Bank v. Vill. of Niles*, 118 Ill. App. 3d 87 (1st Dist. 1983); *see also Lazarus v. Vill. of Northbrook*, 31 Ill. 2d 146, 152 (1964); *Swain v. Winnebago Cty.*, 111 Ill. App. 2d 458, 467 (1st Dist. 1969) ("It is not the function of the county zoning ordinances to provide economic protection for existing businesses.").

Indeed, authorizing municipalities to blatantly discriminate whenever they felt that one competitor paid more in taxes than another would swallow the rule against protectionism. Small takeout restaurants, for instance, often have a small footprint, little to no seating, and a tax bill that is a fraction of that paid by full-size restaurants. Under the appellate court's view of *Napleton*, cities could restrict or outlaw such small-scale entrepreneurs out of concern that consumers, if given a choice, may choose that less-expensive or more-convenient option. The same would be true of online retailers like Amazon that, just like food trucks, use the Internet and city streets to bring their wares to willing customers.

Of course, food trucks pay taxes, just like restaurants and all other businesses. But those amounts can be difficult to calculate and compare across industries. The appellate court's reading of *Napleton* would therefore authorize cities to blatantly discriminate against disfavored businesses whenever they could plausibly *claim* those businesses *might* pay less in taxes. Indeed, under the appellate court's view of *Napleton*, virtually every Illinois case identified above, *see supra* Section I.A., should have come out

differently, as the government could have speculated in each that one competitor might contribute more to the tax base than another.[8]

To allow the police power to authorize blatant protectionism would do violence to the Illinois Constitution. In *Southwestern Illinois Development Authority v. National City Environmental, LLC*, this Court held that the government could not use eminent domain to take from X and give to Y because the government felt the forced transfer would lead to greater economic activity. 199 Ill. 2d 225, 239 (2002). Declaring such actions to be outside the police power, this Court held that "[i]f property ownership is to remain . . . a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain." *Id.* at 240. It should likewise hold that such potential "economic by-products" do not justify depriving LMP of its trade so as to increase, in Chicago's words, the "economic activity of Chicago's restaurants." C.1626.

Since 2008, Illinois courts have cited *Napleton* 136 times. Until this case, it had never been cited as blessing protectionism. But *Napleton* did not overrule *Lazarus*, *Cosmopolitan National Bank*, *Exchange National Bank of Chicago*, *Church*, *Brown*, *Chicago Title & Trust*, and numerous other cases, particularly without even mentioning it was doing so. Because the 200-foot

[8] In addition, Chicago is the one who determines how much both food trucks and restaurants pay in taxes. It should not be allowed to bootstrap that fact into a justification for protecting the latter against competition by the former.

rule's actual, admitted purpose is to burden food trucks so as to financially benefit restaurants, and because the Illinois Constitution rejects such protectionist urges, this Court should reverse and hold that the 200-foot rule violates Article I, Section 2.

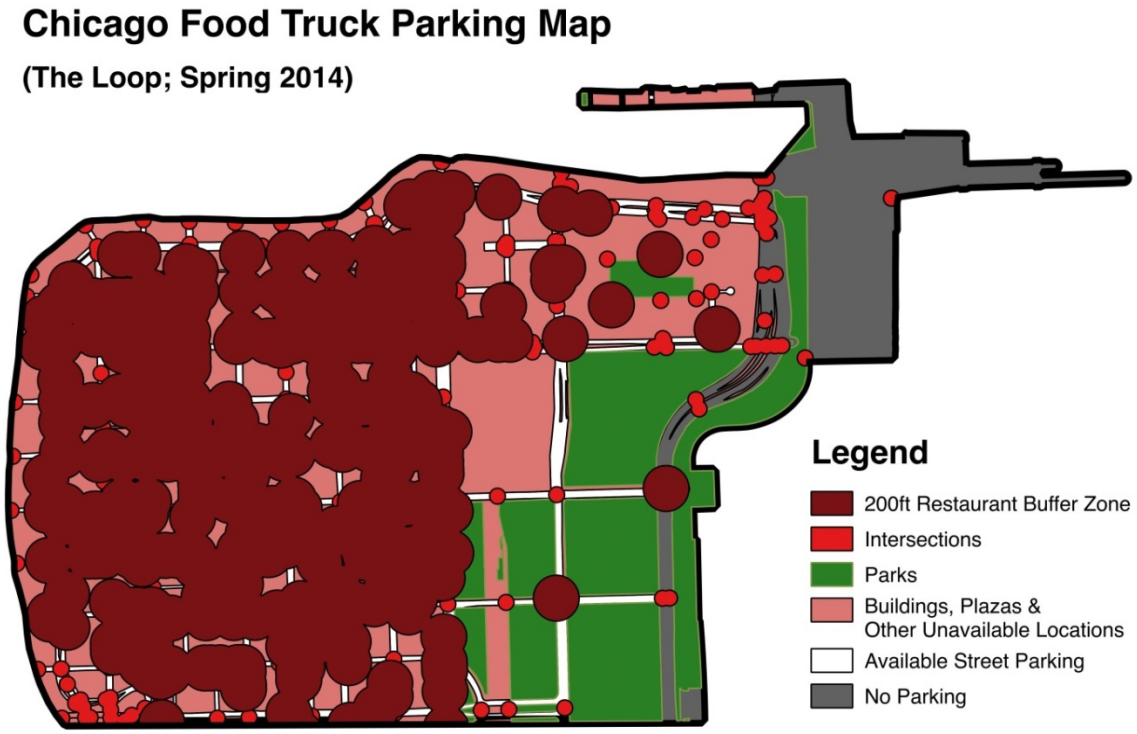
II. The 200-Foot Rule Does Not Reasonably Further Either of Chicago's Non-Protectionist Rationales.

The appellate court premised its entire decision regarding the 200-foot rule on protectionism grounds, A.471, and this Court can therefore reverse entirely on that basis. But in discovery, Chicago also suggested two non-protectionist rationales for its rule: that it would mitigate pedestrian congestion and spread retail food options to underserved areas. To the extent this Court considers those rationales in the alternative, it can easily reject them based on the undisputed facts in evidence, which show that the 200-foot rule is an arbitrary, irrational means of either reducing pedestrian congestion or encouraging food trucks to visit underserved areas.

A. Because the 200-Foot Rule Impairs LMP's Constitutional Right to Pursue Its Trade, It Is Subject to Rational-Basis Review.

The 200-foot rule severely impinges on the right of LMP and Chicago's other food truckers to practice their trade. It paints a circle, 400 feet across, around the front door of each restaurant, coffee shop, and convenience store in the city. Within that circle, no vending may occur. Given that there are thousands of these establishments in Chicago, the rule's cumulative effect is prohibitory. Restaurant data Chicago provided in discovery shows, for

instance, that these hundreds of circles overlap to effectively prevent Laura and others from vending in the vast majority of the northern part of the Loop.



This is an injury of constitutional dimension. As this Court has repeatedly recognized, "[i]t is a well-established constitutional principle that every citizen has the right to pursue a trade, occupation, business or profession. This inalienable right constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the Illinois and Federal constitutions." *Coldwell Banker Residential Real Estate Servs. of Ill., Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985). Although the police power may interfere with that right "where the public health, safety or welfare so requires," *id.*, that power must be exercised reasonably. *Lyon v. Dep't of Children and Family Servs.*, 209 Ill. 2d 264, 272

(2004).

Accordingly, whether the 200-foot rule is constitutional turns on the rational-basis test, which requires a "definite and reasonable relationship to the end of protecting the public health, safety and welfare." *Church*, 164 Ill. 2d at 165; *see also Krol v. Cty. of Will*, 38 Ill. 2d 587, 590 (1968) (requiring "a definite and substantial relation to a recognized police-power purpose"). This test, which applies to a municipality's police power over its public streets, *see supra* Section I.A.2, "is not 'toothless' and [courts] must strike down provisions which run afoul thereof." *People v. Jones*, 223 Ill. 2d 569, 596 (2006) (citation omitted).

In applying that test, Illinois courts employ a two-step inquiry. The first step looks at whether the articulated legislative purpose is a legitimate one. If it is, the court then examines the relationship between that purpose and the means the ordinance employs to effectuate it. Even an ordinance meant to serve legitimate interests is invalid if facts and circumstances demonstrate that it does not reasonably further that interest. *Krol,* 38 Ill. 2d at 591.

This Court took that fact-based approach in *Chicago Title & Trust*. There, Lombard claimed its rule preventing new gas stations from opening within 650 feet of existing ones would reduce the risk of fire and explosions, and that having stations located too near each other increased congestion. 19 Ill. 2d at 101–02. But this Court examined the record amassed by the

plaintiffs and concluded that they had negated Lombard's asserted rational bases. This Court credited expert testimony demonstrating that one station's proximity to another did not enhance any danger from fire. *Id.* at 105; *see id.* at 102–03 (expert testimony). It also noted that the 650 feet Lombard mandated between gas stations was far larger than the 150 feet it required between a gas station and a hospital, church, or school, and concluded that, if the concern was danger to the public, the 650-foot rule was "clearly unreasonable." *Id.* at 105. It noted that gas stations were no different than other businesses, and that existing stations could continue operating within 650 feet of one another, both of which undercut Lombard's congestion rationale. *Id.* at 105–07. It therefore upheld the circuit court and struck the 650-foot rule down.

Chicago's 200-foot rule fails rational-basis review under the standard this Court laid out in *Chicago Title & Trust* and other cases. In Part B, LMP demonstrates that the rule is not a reasonable means of mitigating pedestrian congestion. And in Part C, LMP explains why the rule is not a rational means of encouraging food trucks to operate in underserved areas.

B. The 200-Foot Rule Is Not a Reasonable Means of Mitigating Pedestrian Congestion.

The appellate court's ruling on the 200-foot rule rested exclusively on protectionism. The idea that the rule mitigates pedestrian congestion has always been an afterthought. And for good reason. The evidence demonstrates the rule's unreasonableness as a pedestrian congestion

measure. In Section 1, LMP shows the arbitrariness of the 200-foot rule as a pedestrian congestion measure, both because it applies only to one potential source of congestion (food trucks operating near restaurants) and because it sweeps far more broadly (and fines much more heavily) than laws actually designed to mitigate congestion. In Section 2, LMP demonstrates how the rule's exemptions for food trucks serving construction workers or operating at mobile-food-vehicle stands undercut any claim of rationality. In Section 3, LMP illustrates how the rule blocks food-truck operations even on private property and other places where congestion concerns do not arise. And in Section 4, LMP discusses an empirical expert study that showed that the distance between food trucks and restaurants has no effect on the degree of pedestrian congestion.

1. The fact that the 200-foot rule requires trucks to stay much farther away from restaurants than actual congestion sources and imposes far greater fines for violations undercuts the rule's reasonableness.

Chicago's proximity restriction is just as unreasonable a congestion tool as Lombard's proximity restriction was an unreasonable means of ensuring public safety. In *Chicago Title & Trust*, one rationale for Lombard's rule was that preventing new gas stations from opening within 650 feet of existing ones would protect the public from fire and explosions. *See* 19 Ill. 2d at 101.

But this Court saw through that charade. It pointed out that Lombard only required that new gas stations not be "within 150 feet of any hospital,

church or school." Said the Court,

> [I]t can hardly be supposed that proximity to such places, where numbers of people are accustomed to assemble, involves less danger than proximity to another filling station. To require filling stations to be separated by at least 650 feet, while requiring an intervening distance of only 150 feet between a filling station and a hospital, church or school, is clearly unreasonable if the test is danger to the public.

Chicago Title & Trust, 19 Ill. 2d at 104–05.

The same situation exists here. Just like Lombard's 650-foot rule, Chicago's 200-foot rule requires that food trucks stay much farther away from restaurants than actual congestion sources. Chicago testified that in "most everyday circumstances," it would not "expect lines and crowds to form outside retail food establishments," and that lines and crowds would not be "typical." A.186. By contrast, Chicago admitted that "[b]efore a performance starts, there tends to be a crowd around a theater entrance." A.183. Yet Chicago lets food trucks park outside a theater so long as they're not immediately outside the theater's doors. MCC § 9-64-100(h).

Or look at intersections. Chicago admitted they pose a distinct congestion concern, with Chicago's expert testifying that "[p]latooned pedestrian flows," side-by-side walking that can increase the severity of pedestrian congestion, "generally occur near traffic signals." C.1917. But the rule requires that food trucks stay up to *ten times* farther away from restaurants than from these sensitive locations. MCC §§ 7-38-115(e)(i) (20 feet from crosswalk); 7-38-115(e)(ii) (30 feet from stop signs and lights).

Chicago also imposes far greater fines for violating the 200-foot rule as compared to these actual anti-congestion measures. Fines for violating the 200-foot rule start at $1,000 and can reach up to $2,000, A.60–61, up to *thirty times higher* than the fine for parking too near crosswalks ($60), stop signs and lights ($60), or theaters ($100).[9]

Nor do restaurants pose any greater pedestrian congestion risk than department stores, office buildings, or other businesses. Expert research, discussed in more detail below, noted no pedestrian congestion impacts caused by restaurants. *See infra* Section II.B.4. And although Chicago's congestion expert said that people can travel in groups to restaurants, he admitted that "[p]eople can walk in groups to a lot of different places. I mean anything, really." C.1734. Despite that, Chicago mandates *no* minimum distance between food trucks and numerous other establishments with significant pedestrian traffic like department stores and office buildings.

The fact that Chicago permits many other activities that raise congestion concerns to locate within 200 feet of a restaurant further shows the rule's unreasonableness as a congestion measure. Chicago's 1,000-plus street performers—who greatly outnumber Chicago's food-truck population—can play directly outside a restaurant even though they, in Chicago's words, often "claim a large area of the sidewalk for their instruments and

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[9] *Parking, Compliance, and Automated Enforcement Violations*, City of Chicago, https://www.cityofchicago.org/city/en/depts/fin/supp_info/revenue/general_parking_ticketinformation/violations.html (last visited Aug. 16, 2018).

themselves and constrain the flow getting around them." A.177. Handbillers may also operate outside restaurants even though Chicago said they too were "a potential source" of congestion. A.176. And vending carts, which both serve pedestrians and are *parked directly upon the sidewalk*, can sit immediately outside a restaurant's front doors. MCC § 7-38-148(3).

If the goal was actually to mitigate congestion, then prohibiting food trucks, and only food trucks, from operating near restaurants while simultaneously allowing these other activities would be an arbitrary and ineffective way of achieving that goal. These discrepancies show that it is competition, not congestion, that the rule seeks to suppress.

2. The fact that the 200-foot rule exempts food trucks serving construction workers and/or operating at a mobile-vending-vehicle stand—situations where congestion concerns would be just as, if not more, pronounced—undercuts any claim of the rule's reasonableness as a congestion measure.

Chicago Title & Trust instructs that courts should be extremely skeptical when a proximity restriction has exemptions that undercut its purported rationales. Lombard's 650-foot rule, for instance, permitted existing stations within 650 feet to keep operating even though they raised the same fire and explosion concerns Lombard claimed motivated the rule. 19 Ill. 2d at 106. Because the plaintiff's "proposed service station [wa]s no different from those already in operation," the Court held that the exemption undercut the 650-foot rule's reasonableness. *Id.* at 107; *see also Lou Owen, Inc. v. Vill. of Schaumberg*, 279 Ill. App. 3d 976, 987–88 (1st Dist. 1996)

(invalidating ban on for-profit dances where it found "a paucity of evidence to show a reason for distinguishing between commercial and noncommercial activities").

Chicago's 200-foot rule contains two glaring exceptions that raise the same deficiency identified in *Chicago Title & Trust* and *Lou Owen*. First, Chicago exempts food trucks serving construction workers from the rule. A.52–53. This exemption exists because in 1986, a company whose trucks primarily served construction workers succeeded in having a court invalidate the 200-foot rule's predecessor under Article I, Section 2. A.51, C.1520. When Chicago re-enacted the rule, it exempted trucks serving construction workers to head off another lawsuit. It did this although, as anyone walking by a construction site knows, construction can pose significant congestion concerns. In fact, Chicago admitted that construction projects imposing on the right-of-way can "contribute to pedestrian congestion," A.186, *see also* A.136–37.

The construction exemption's broad and undefined scope only underscores its arbitrariness. Chicago admitted that food trucks qualifying for the exemption need not exclusively serve construction workers. When LMP asked what minimum "percentage of customer clientele" had to be construction workers, Chicago could not say. A.135. Chicago also testified that a truck need not be on a construction site to qualify; it is enough that it be "in the proximity of the construction site." A.134. But when LMP asked

what distance "in the proximity" indicated, Chicago was again at a loss. A.135. And it is important to remember that, at any given time, there are *thousands* of active construction permits in Chicago. A.137.

The 200-foot rule's exemption for trucks operating at designated parking spots called "mobile-food-vehicle stands," A.61, further undercuts the rule's reasonableness as a congestion measure. City law requires five stands in each community area with more than 300 retail-food establishments, MCC § 7-38-117(c), areas that Chicago admitted are densely populated and contain "a lot of pedestrian congestion." A.205. But these stands have little to no oversight: Chicago, for instance, has no regulations concerning the stands, *see* C.1969, and it was not aware of anyone tasked with monitoring them. A.152. Yet despite this, Chicago was unaware of having ever "received any [c]omplaints about sidewalk congestion at mobile food vehicle stands." A.154.

Chicago claimed that its exemption for mobile-food-vehicle stands was reasonable because they were less likely to cause pedestrian congestion than non-stand locations. Not only did Chicago provide no basis for that assertion, but research showed it to be incorrect. As discussed in more detail below, *see infra* Section II.B.4, Professor Renia Ehrenfeucht is an expert on the use of sidewalks who conducted a large-scale study of seven different food-truck locations across the Loop. A.220–22. As part of that study, Professor Ehrenfeucht analyzed congestion outcomes at three mobile-food-vehicle stand locations and compared that to congestion outcomes arising at four, non-

stand locations. A.222. That analysis found that no pedestrian congestion differences existed between the two. A.221.

3. The fact that the rule prohibits food trucks from operating on private property and other locations where no congestion concerns could reasonably exist further undercuts its claim of reasonableness.

The 200-foot rule is also unreasonable as a congestion measure because it prohibits food trucks from operating where no congestion concerns exist. In *Krol v. County of Will*, this Court held that a "regulation attempted where the threat to public health is remote" should be declared invalid. 38 Ill. 2d at 591 (citing *City of W. Frankfort v. Fullop*, 6 Ill. 2d 609, 614 (1955)). In striking down the county's requirement that Krol's waste only be deposited in a continuously flowing stream—even though that waste had already been treated—the Court found it relevant that "any possible public benefit which might be gained from the enforcement of the ordinance is slight and the hardship it can inflict on individual property owners is great." *Krol*, 38 Ill. 2d at 592.

The 200-foot rule likewise prohibits food-truck operations where the threat of pedestrian congestion is remote to non-existent. The rule, for instance, prevents food trucks from operating on private property. LMP had wanted to operate in the rear parking lot of Fischman Liquors & Tavern at 4780 North Milwaukee Avenue and had secured permission to do so. A.214. But it could not because two retail food establishments, Krakus Homemade Sausage (located at 4772 North Milwaukee Avenue) and Ideal Pastry (located

at 4765 North Milwaukee Avenue), were within 200 feet of where Cupcakes for Courage would be operating. *Id.* Thus, the rule blocked LMP from operating even though Krakus' entrance was on the other side of the building and Ideal Pastry's entrance was on the other side of Milwaukee Avenue. *Id.*

Figure 1 shows the effect of the 200-foot rule at Fischman Liquors and Tavern.

Neither logic nor evidence suggests that operating on private property could threaten public sidewalks. These are private lots, away from pedestrian traffic. Chicago admitted that it had not "ever heard of a situation where a mobile food vehicle operating on private property led to pedestrian congestion concerns on the public right-of-way." A.202. And, in fact,

Chicago's expert observed three popular food trucks operating in a parking lot and testified that their patrons had no interaction with or effect on anyone on the sidewalk. C.1721.

The 200-foot rule is also unreasonably overinclusive as to public property. LMP wanted to operate, for instance, on West Madison Street to the west of South Wells Street in the Loop. A.213. But because on the intersection's northeastern side was a Red Robin (now a Pret a Manger), which kept Cupcakes for Courage from operating on the next block over. *Id.*

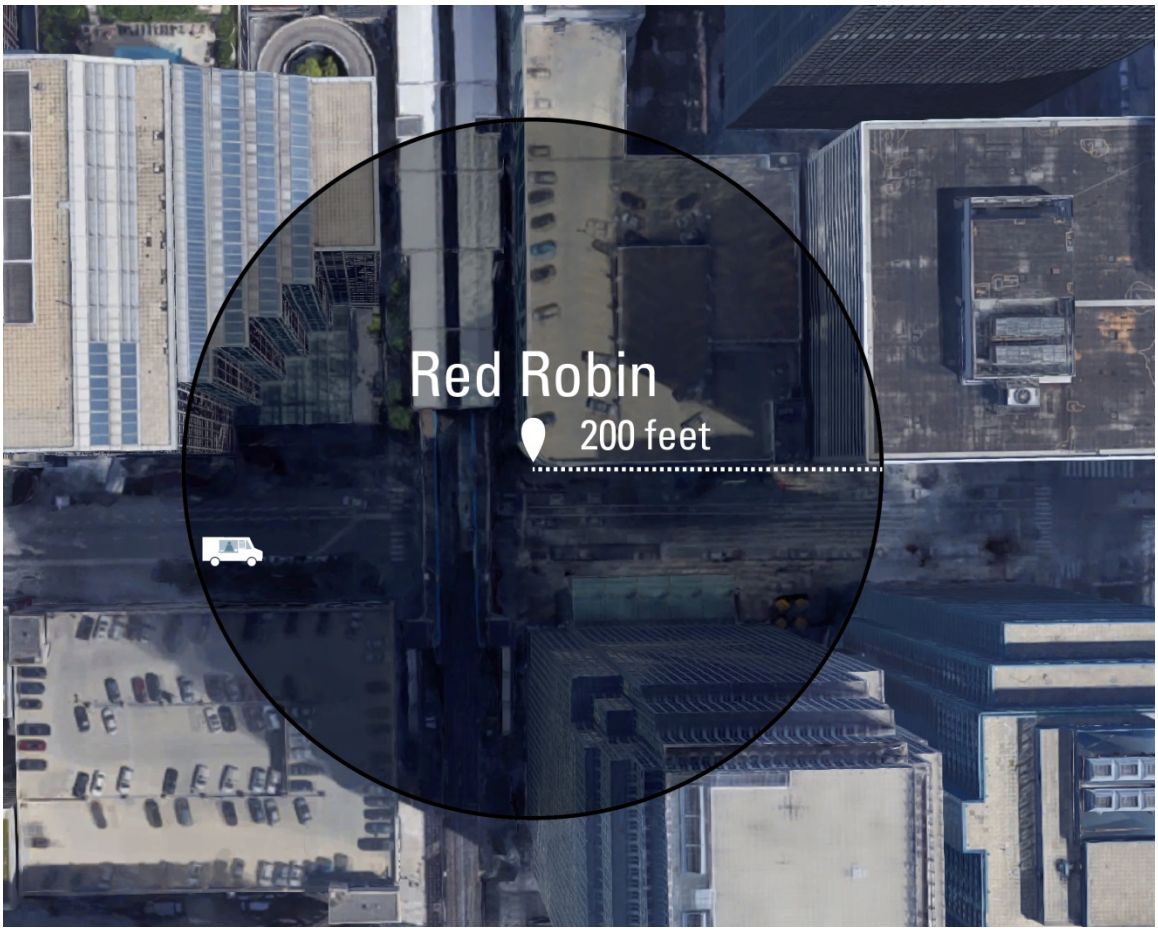

Figure 2 shows the effect of the 200-foot rule at the intersection of West Madison St. and Wells St.

This was because the 200-foot rule applies "as the crow flies," radiating out 200 feet in all directions from a restaurant's door. As a result, a food truck would violate the rule if it "was parked across the street from a restaurant, but was within 200 feet." A.128. The same would be true "if it was a block over, next block over past an intersection [from a restaurant], but still within 200 feet of the [restaurant's] principal customer entrance." *Id.*

Chicago's own words show, however, that prohibiting food trucks in those kinds of circumstances does nothing to help mitigate congestion. In deposition, Chicago's designated representative testified that a source like a food truck or street performer causes what is known as "localized congestion." A.178. When LMP asked how far localized congestion could be felt, Chicago responded by saying that "localized congestion can affect a block face," which is a single side of a street between two intersections. *Id.*

The 200-foot rule therefore prevents food trucks from operating even where they couldn't possibly implicate Chicago's purported congestion interest. Indeed, as the next Section shows, empirical research shows that the distance between food trucks and restaurants has no effect on pedestrian congestion.

4. Expert research confirming that pedestrian congestion does not turn on a food truck's proximity to a restaurant undercuts any claim of its reasonableness.

Lastly, Chicago's congestion rationale rests on a faulty premise: that the closer food trucks operate to a restaurant, the more pedestrian congestion

will result. Empirical research shows this not to be the case. Renia Ehrenfeucht, Professor of Urban Planning and an expert on the use of sidewalks, A.219–20, conducted a large-scale study of seven different food-truck locations across the Loop during lunchtime to evaluate Chicago's congestion rationale. A.220–22. Four locations were within 200 feet of a restaurant, while three were 200 feet or farther away. A.223. The study confirmed that the distance between a truck and a restaurant did not affect the amount of pedestrian congestion. A.221. It also confirmed that no pedestrian congestion differences existed as between the three food-truck stands and four non-stand locations studied. *Id*. And it noted no instances in which restaurants had lines outside or where people entering or exiting a restaurant caused pedestrian congestion. *Id.*

The 200-foot rule is just as arbitrary a pedestrian congestion measure as the 650-foot rule in *Chicago Title & Trust* was as a public safety measure. The undisputed evidence demonstrates that the rule's reach far exceeds other, actual, congestion measures; that it arbitrarily singles out restaurants and food trucks for special treatment; that it irrationally exempts certain food trucks that raise equal, if not greater, congestion concerns; and that it prohibits food trucks from operating even in situations where they simply could not cause congestion problems. In reviewing this evidence, this Court should reach the same conclusion it did in *Chicago Title & Trust*: "that the actual purpose served by the restriction has little to do with public health or

safety." 19 Ill. 2d at 104. This Court should therefore reject the idea that the rule is a reasonable congestion measure.

C. The 200-Foot Rule Is Not a Reasonable Means of Increasing Retail Food Options in "Underserved" Areas.

Chicago also claimed that its 200-foot rule helps increase retail food options in "underserved" areas "by providing an incentive to food trucks to locate in areas that lack many or any restaurants." C.1627. This post-hoc argument, which the circuit court rejected, has no basis on the law's face, in economic theory, or in practice.

First, the law on its face is an unreasonable means to increase food-truck operations in underserved areas. That is because the rule applies throughout all of Chicago, including in underserved areas. As a result, even one restaurant in an underserved area will prohibit a food truck from parking anywhere nearby—directly undermining Chicago's purported objective. *E.g.*, A.422.

Indeed, if spreading retail food options were the goal, Chicago had many tools at its disposal. It could suspend the 200-foot rule in underserved areas. It could have installed mobile-vending-vehicle stands. Or it could have taken *any* other step to encourage trucks to operate there, such as by offering longer operating hours, lowering licensing fees, or just speaking to truck owners about it. But Chicago did *none* of those things. C.2096–97, C.2100.

Economic reasoning also refutes this rationale. Henry Butler is a Ph.D. economist who analyzed Chicago's spreading retail food options rationale from both a theoretical and empirical perspective. A.415–17. Regarding the former, Dr. Butler testified that "[e]conomic theory predicts that the 200-foot rule cannot and will not achieve the City's stated goal of encouraging food trucks to operate in community areas lacking sufficient retail food options." A.417. Food-truck operators wish to maximize their profits; since a truck's costs are largely the same no matter where it operates, A.419, operators will go where demand is highest. *See id.* Accordingly, economic logic suggests that food trucks will focus on dense areas where consumers have relatively high levels of disposable income.[10] A.421. Because "underserved" areas lack these features, economic theory predicts little vending there. A.422–23.

Evidence bears out this economic reasoning. Dr. Butler analyzed the Twitter messages of Chicago's food trucks to determine if they operate in underserved areas. A.423. He collected over 48,000 tweets from more than 140 food trucks and used three separate tests to see if food trucks go to six community areas Chicago called "underserved" in discovery. A.423–26. Dr. Butler's study found no empirical support for the government's rationale,

[10] Butler's analysis accords with Chicago's own testimony and research. The City admitted two questions potential retailers have about a neighborhood are its population and median income. C.2087. A "Citywide Retail Market Analysis" commissioned by Chicago likewise pointed out that "[h]ousehold income and density are key indicators of potential demand." C.2187.

with all three tests showing a total of only 34 stops in underserved areas over more than a year. *See* A.426–28. In fact, Dr. Butler testified that such operations were "so rare" that "it's almost like these [trucks wind up in these areas because they] get lost." C.4099. Instead, food trucks congregated where economic theory predicted: high-density, high-income neighborhoods like the Loop, Near North, and Near West. By contrast, Chicago never analyzed whether the 200-foot rule actually spreads retail food options. C.2094–95.

Given all of this evidence, it is simply not reasonable to think the 200-foot rule could or does spread retail food options.

III. Chicago's GPS Tracking Requirement Violates Article I, Section 6.

Chicago forced LMP to install a GPS tracking device on Cupcakes for Courage. Every five minutes, that device transmits Cupcakes for Courage's location to a GPS service provider, which must turn over both current and historical location information to Chicago upon request. It must also maintain "a publicly-accessible application programming interface (API)," a software "door" that is open to anyone upon request. A.304. People who access that door can find out where Cupcakes for Courage is at any moment.

Laura Pekarik objects to this requirement. As Laura testified, LMP's employees often work alone on the truck, and some have previously been harassed and threatened by members of the public or people they knew from outside of work. A.215. Laura can refrain from updating the truck's location

on social media when her employees face that unwanted attention. *Id.* But she cannot turn off the GPS tracking device, since Chicago law mandates that it be on whenever Cupcakes for Courage is in operation. *Id.*

Despite this, the appellate court held that Chicago's GPS requirement was not a search. The court reached that conclusion in part because Chicago made Laura install the device rather than do the job itself. A.473, ¶ 52. And the court said that, because Chicago requires GPS tracking as a condition of licensure, "LMP cannot raise a fourth amendment challenge to 'bar enforcement of the very conditions upon which extension of the license is predicated.'" A.475, ¶ 56 (quoting *Grigoleit, Inc. v. Bd. of Trustees*, 233 Ill. App. 3d 606, 613 (4th Dist. 1992)).

These conclusions fundamentally misinterpret search-and-seizure jurisprudence, as the holdings of this Court and the U.S. Supreme Court demonstrate. Below, LMP explains that Chicago's GPS requirement is a search for two independent reasons. First, the requirement is a search under the property-rights framework laid out in *United States v. Jones*, 565 U.S. 400 (2012), because it mandates that LMP physically install a GPS tracking device on its vehicle in order to exercise its right to practice its trade under Article I, Section 2. Second, the requirement is also a search under *Katz v. United States*, 389 U.S. 347 (1967), because, by enabling Chicago to engage in long-term tracking of Cupcakes for Courage's whereabouts, the GPS scheme

impinges on LMP's reasonable expectation of privacy.[11]

Because GPS monitoring is a warrantless search, it is per se unreasonable and Chicago had to prove that it fit into one of a few well-established exceptions to the warrant requirement. Chicago failed to meet that burden, or indeed present any evidence on the point below. That alone should be fatal. But as shown below, Chicago's warrantless search scheme violates Article I, Section 6, both because Chicago never used it for its intended purpose and because it requires LMP's data to be shared with anyone who asks for it.

A. A Law Requiring the Installation and Use of GPS Devices so the Government Can Obtain Information Accomplishes a Search.

Precedent demonstrates that requiring food-truck operators to install and use GPS tracking devices is a search. In *United States v. Jones*, 565 U.S. 400 (2012), officials installed a GPS device on Jones' vehicle without a proper warrant and tracked it for several weeks. Following his arrest, Jones moved to suppress the GPS evidence. The district court largely denied the motion, but the D.C. Circuit reversed, holding that long-term GPS monitoring is a search for Fourth Amendment purposes. *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

The U.S. Supreme Court unanimously affirmed, with five justices (Scalia, J., joined by Roberts, C.J., Kennedy, Thomas, and Sotomayor, JJ.)

[11] Illinois courts construe Article I, Section 6 as generally consistent with the Fourth Amendment. *People v. Caballes*, 221 Ill. 2d 282, 309 (2006).

holding that a search had occurred because the government had physically occupied private property, without first getting Jones' consent, for the purpose of obtaining information. *Jones*, 565 U.S. at 404. Illinois courts have recognized that, pursuant to *Jones*, installing a GPS device on a vehicle without consent constitutes a search. *See, e.g.*, *People v. LeFlore*, 2015 IL 116799, ¶ 10; *People v. Bravo*, 2015 IL App (1st) 130145, ¶ 15.

1. Whether GPS monitoring is a search turns on whether installation was done with the property owner's consent, not on who does the installing.

The appellate court held that *Jones* did not apply, though, because Chicago required LMP to install the device, rather than doing the installation itself. A.473, ¶ 52. That conclusion is legally unsupportable, and holdings from across the nation state that laws mandating GPS tracking require constitutional scrutiny, no matter whether the government or the individual happens to be the one doing the installing.

First, the appellate court failed to appreciate that under *Jones*, the unconsented placement of a GPS tracking device is a warrantless search. *Jones*, 565 U.S. at 413 (Sotomayor, J., concurring) (noting that the problem was placing the GPS "without Jones' consent"). As the U.S. Supreme Court's decision in *Grady v. North Carolina* illustrates, it is this lack of consent—not who physically installs the device—that controls. 135 S. Ct. 1368 (2015) (per curiam). In *Grady*, a civil statute required certain offenders, upon release, to wear GPS tracking devices. Torrey Grady noted his eligibility for monitoring under the statute but did not consent to it, instead arguing that it was an

unreasonable warrantless search. *Id*. at 1369. Like the appellate court here, North Carolina courts held that requiring GPS tracking did not constitute a search. *Id*. at 1369–70.

But a unanimous U.S. Supreme Court disagreed, holding that North Carolina's program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Id*. at 1371. Thus, *Grady* turned on whether North Carolina's program *required* Grady to wear a tracking device so it could acquire information. Whether officials attached the device or had Grady do it was not important.

LMP no more consents to attaching a GPS tracker to its truck than Grady consented to having a GPS tracker attached to his body. As this Court has recognized, the "standard for valid consent . . . is whether that consent is voluntarily given." *People v. Bean*, 84 Ill. 2d 64, 69 (1981). And here, nothing is voluntary; Chicago's ordinance forced LMP to put a tracking device on its vehicle in order to practice its trade. As the next section demonstrates, this "acquiescence to a claim of lawful authority," *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968), does not equal consent. Conditioning the receipt of a vending license on GPS monitoring cannot free Chicago's scheme from constitutional scrutiny. *El-Nahal v. Yassky*, 835 F.3d 248, 259 (2d. Cir. 2016) (Pooler, J., concurring in part and dissenting in part) (stating that regulations requiring taxi owners to install GPS tracking devices as a

condition of licensure "worked an unlicensed physical intrusion on a constitutionally protected effect" and therefore constituted a search).

2. Mandating GPS tracking as a condition of licensure is a "search" that warrants constitutional scrutiny.

The appellate court also held that Chicago's GPS requirement was not a search because it was a condition of licensure and LMP therefore implicitly consented to the monitoring. A.474–75. In support, it cited *Grigoleit, Inc. v. Board of Trustees*, a lower court case concerning the revocation of a company's wastewater permit, and stated that "[i]n accepting a license to conduct business from the City street, LMP cannot raise a fourth amendment challenge to 'bar . . . enforcement of the very conditions upon which extension of the license is predicated.'" A.475, ¶ 56 (quoting *Grigoleit*, 233 Ill. App. 3d 606, 613 (4th Dist. 1992)).

The appellate court's statement, that businesses implicitly consent to whatever conditions the government may wish to impose, is wrong. As the leading commentator on the Fourth Amendment has stated, an ordinance imposing an inspection scheme "is not entitled to be conclusively presumed valid under the Fourth Amendment merely because it is directed toward businesses licensed by . . . the government." 5 Wayne R. LaFave, Search and Seizure § 10.2(c) (5th ed. 2012). The government therefore may not avoid constitutional scrutiny by presuming that individuals consented to searches as a condition of licensure; instead, it must prove that those searches are reasonable. If the ordinance or statute authorizing the search is

unreasonable, no consent can be imputed. *See McElwain v. Office of the Ill. Sec'y of State*, 2015 IL 117170, ¶ 21 (noting that where statute requiring drivers to consent to searches was unconstitutional, state could not punish driver for refusing to consent) (citing *King v. Ryan*, 153 Ill. 2d 449, 462 (1992)); *Serpas v. Schmidt*, 827 F.2d 23, 30 (7th Cir. 1987) (rejecting contention that racetrack employees, by accepting occupational licenses, had implicitly consented to inspections of their quarters, holding that any such consent "was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulations"), *overruled in part on other grounds by LeRoy v. Ill. Racing Bd.*, 39 F.3d 711, 714 (7th Cir. 1994).

This can be seen in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), where the U.S. Supreme Court evaluated a Los Angeles ordinance that required hoteliers, as a condition of licensure, to maintain records about guests and their vehicles and make those records available to police for inspection. *Id*. at 2448. A group of hoteliers sued, contending that the ordinance violated the Fourth Amendment.

Patel demonstrates that an occupational license does not equal consent and does not preclude evaluating whether a search scheme is reasonable. After all, if licensees may not "raise a fourth amendment challenge to 'bar . . . enforcement of the very conditions upon which extension of the license is predicated,'" A.475, ¶ 56, Patel's lawsuit should have failed at the outset. Los Angeles would have been free to make Patel give up his constitutional right

to be free from unreasonable searches in order to exercise his right to practice his trade. But that is *not* what happened. Instead, the Supreme Court held not only that Patel and his fellow plaintiffs could challenge Los Angeles' ordinance, but that their challenge was successful. 135 S. Ct. at 2453.

This lesson from *Patel*—that warrantless searches, prescribed as a condition of licensure, are not immune from constitutional scrutiny—also can be found in holdings by lower Illinois courts. In *Hansen v. Illinois Racing Board*, 179 Ill. App. 3d 353 (1st Dist. 1989), for instance, the Racing Board's regulations stated that individuals, "in accepting a license, do[] thereby irrevocably consent to" inspections of any "stables, rooms, vehicles, or other places" by Board officials. *Id*. at 357 (citation omitted). The Board suspended Warren Hansen, a Racing Board licensee, after he refused to allow a search of his pick-up truck.

Hansen challenged his license suspension on Article I, Section 6 grounds. Again, if the appellate court were right, Illinois courts should have rejected Hansen's challenge because he had implicitly consented to the inspections in securing his license. But not only was Hansen able to *raise* a Fourth Amendment challenge, he *won*. The First District struck down the Racing Board's rule because it—just like Chicago's GPS scheme—failed to adequately cabin inspecting officers' discretion. *Id*. at 359; *see also 59th & State St. Corp. v. Emanuel*, 2016 IL App (1st) 153098, ¶ 21 (holding that a rule requiring licensees to submit to warrantless searches was unreasonable).

The cases cited above demonstrate why the appellate court's citation to *Grigoleit* missed the mark. Grigoleit, Inc. was a manufacturer of decorative trim for the appliance industry. Because Grigoleit discharged over 25,000 gallons of water a day into Decatur's water treatment system, it was deemed a "significant industrial user" that had to, among other things, give Decatur's Sanitary District access to its drains so the District could verify that it was not discharging any chemicals that would harm the sewers. *Grigoleit*, 233 Ill. App. 3d at 609. But Grigoleit refused to let District personnel do that verification. *Id*. at 610. In response, the Sanitary District rescinded Grigoleit's authority to discharge its manufacturing waste into Decatur's sewers. *Id*.

Grigoleit complained, arguing that the District's actions violated the Fourth Amendment. But the appellate court disagreed, holding that "no questions of constitutional magnitude are presented" and that "[t]he fourth amendment constitutional provisions respecting issues of administrative searches have no application to the facts of this case." *Id.* at 612, 614. In the appellate court's view, Grigoleit had no right to a sewer connection and could choose to avoid inspections by processing its own wastewater or disposing of it by other means.

The reasoning of *Grigoleit* and its view of implicit consent is incorrect. As this Court said in *People v. Anthony*, "[c]onsent must be received, not extracted 'by explicit or implicit means, by implied threat or covert force.'"

198 Ill. 2d 194, 202 (2001) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973)). This is why courts have repeatedly held that they will not deem people to have implicitly consented to unreasonable searches in exchange for even discretionary benefits. *See, e.g.*, *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1378 (11th Cir. 2014) (stating that Florida's welfare program, which mandated drug testing of recipients, could not be deemed reasonable because recipients "consented" to the testing as a condition of receiving benefits); *Milewski v. Town of Dover*, 2017 WI 79, ¶ 68 (holding that government could not require property owner to consent to interior inspection of home in order to contest property-tax assessment).

And here, LMP is put to a stark choice. In order to practice its trade, LMP must secure a license from Chicago. And just like the governments tried to do in *Patel* and *Hansen*, Chicago tells LMP it must choose between two constitutional rights: its Article I, Section 2 right to practice its trade or its Article I, Section 6 right to be free of unconstitutional searches. Because Chicago's GPS requirement mandates food truckers either install tracking devices on their vehicles or forsake their constitutional "right to pursue a trade, occupation, business or profession," *Coldwell Banker*, 105 Ill. 2d at 397, its effects a warrantless search that Chicago must justify.

B. The GPS Rule, by Authorizing Long-Term Monitoring of LMP's Location, Also Impinges on LMP's Reasonable Expectation of Privacy.

Chicago's GPS requirement, by mandating the physical installation of GPS tracking devices, constitutes a search under the property-rights holding of *Jones*. But it also constitutes a search for a second, independent reason. As the majority in *Jones* recognized, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." 565 U.S. at 409. And five justices in *Jones* applied *Katz* to conclude that "longer term GPS monitoring . . . impinges on expectations of privacy" and therefore constitutes a search. *Id*. at 430 (Alito, J., concurring in the judgment); *see also id*. at 415 (Sotomayor, J., concurring) (agreeing with Justice Alito's statement).

Thus, if Chicago's GPS requirement fails either the property-rights or reasonable-expectation-of-privacy tests laid out in *Jones*, it is a search. It fails both. As shown above, requiring LMP to physically install a tracking device violates its property rights. And the long-term monitoring Chicago's GPS requirement enables impinges on LMP's expectations of privacy and therefore constitutes a search under *Katz*. In *Jones*, Justice Alito concluded that monitoring Jones' vehicle for four weeks via GPS tracker was "surely" a search. 565 U.S. at 430. But Chicago's GPS requirement is far more invasive. Under Chicago's regulations, a GPS device must transmit its location every five minutes a food truck is operating, even when operators are

cleaning their truck at the commissary. A.166. GPS providers must record that location information so officials may request and review it. *Id.* And those providers must turn over not only a truck's current location but at least *six months* of historical records. *Id.* If that is not long-term monitoring, it is hard to envision what could be.

Nor does it matter that LMP tweets out its general location. It is true that "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information," *United States v. Jacobsen*, 466 U.S. 109, 117 (1984), and LMP does not claim its tweets are private. But in transmitting LMP's location every five minutes, its GPS device reveals far more than what LMP shares, including when Cupcakes for Courage is operating in the privacy of its commissary. In addition, Laura Pekarik, LMP's owner, noted that her employees in the past have been stalked by customers or other people. A.215. Although she can stop posting Cupcakes for Courage's location on social media in those situations, she cannot do the same regarding GPS tracking since Chicago law mandates that it be transmitting whenever Cupcakes for Courage is operating. *Id.* Both the precision and constancy of Chicago's surveillance scheme reveal it as a warrantless search the city must justify.

C. Chicago's Warrantless GPS Tracking Scheme Is Unreasonable.

As noted above, the appellate court found that Chicago's GPS tracking requirement did not amount to a search that warranted any constitutional

scrutiny. But it is a search, both because it requires LMP to install and use a GPS device on its vehicle and because that device empowers long-term monitoring of Cupcakes for Courage's location.

Because Chicago's GPS scheme is a warrantless search, it is per se unreasonable. *People v. Bridgewater*, 235 Ill. 2d 85, 95 (2009) (declaring that warrantless post-arrest search of vehicle "was *per se* unreasonable under the fourth amendment"). To be upheld, Chicago must prove that it fits within one of "a few specifically established and well-delineated exceptions" to the warrant requirement. *Patel*, 135 S. Ct. at 2452 (internal quotations and citations omitted).

Below, Chicago defended its GPS requirement as a warrantless inspection of a closely regulated business.[12] But warrantless inspections of these businesses are deemed reasonable and constitutional only if they meet all three criteria the U.S. Supreme Court laid out in *New York v. Burger*: First, the regulatory scheme must serve a substantial government interest. Second, warrantless inspections must be necessary to further that interest. And third, the law must be an adequate substitute for a warrant. 482 U.S. 691, 702–03 (1987).[13]

Chicago's GPS scheme fails the second and third prongs of *New York v. Burger*. GPS tracking is not necessary, as shown by the fact that Chicago

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[12] LMP acknowledges that food service is a closely regulated industry. *City of Chicago v. Pudlo*, 123 Ill. App. 3d 337, 347 (1st Dist. 1983).
[13] Illinois uses the *Burger* criteria in evaluating warrantless inspections. *See, e.g.*, *Fink v. Ryan*, 174 Ill. 2d 302, 305 (1996).

never used location data for its ostensible purpose. And Chicago's requirement that GPS service providers make LMP's data available to *anyone* who requests it renders the scheme unconstitutionally overbroad.

1. GPS tracking cannot be deemed necessary when Chicago never used GPS tracking to facilitate a health inspection.

Chicago claimed that the purpose of its GPS requirement was to locate food trucks in order to conduct field inspections and investigate public-health complaints, which by all accounts are substantial interests. C.1630–31. To satisfy the second criterion in *New York v. Burger*, Chicago had the burden of demonstrating that GPS monitoring was necessary to meet these substantial interests by submitting evidence showing that, absent GPS monitoring, it could not enforce its health ordinances as effectively. *See Burger*, 482 U.S. at 702–03. But not only did Chicago not put forward any such evidence, it admitted that it had *never* "requested GPS data when it's wanted to go out and conduct an inspection in response to a complaint about a public health issue." A.246.

Instead, Chicago has employed other, less-intrusive means of locating a food truck, such as by reviewing social media or calling operators. It pointed out that "[i]f we want to conduct an inspection in the field, what we have done is tried to locate them using Twitter." *Id.* And it admitted that every time Chicago had conducted field inspections, it had located trucks using "social media. Either by Facebook or by Twitter." A.253. A warrantless scheme that has *never* been used for its proffered rationale is by

definition not "necessary."

2. The GPS scheme is unconstitutionally excessive in scope.

The GPS scheme is unreasonable for a second, independent reason. Although Chicago doesn't access GPS data for its ostensible purpose, it ensures that anyone who wants to can access that data and follow a food truck's every move. This authorizes a far broader dissemination of LMP's location data than any governmental interest supports.

In *New York v. Burger*, the U.S. Supreme Court held that a statute authorizing a warrantless inspection scheme must provide sufficient guidance so that it can serve as an adequate substitute for a warrant. This guidance is twofold: Not only must the scheme 1) advise the person being searched that the search has a properly defined scope, but it must also 2) limit inspecting officers' discretion. *Burger*, 482 U.S. at 703.

Chicago's GPS scheme fails this requirement. To be constitutional, all searches must be "reasonably related in scope to the circumstances which justified the interference." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968); *see also Burger*, 482 U.S. at 711 (holding that the "time, place, and scope of the inspection [must be] limited") (quotation marks and citation omitted). But the plain text of Chicago's GPS requirement lacks any properly defined scope: It requires that GPS providers have "a publicly-accessible application programming interface (API)." MCC § 7-38-115(*l*).

Eugene Lorman, the founder of Truckspotting, LMP's GPS service

provider, explained that an API is a "door through which one system can obtain information from another system." A.304. Mr. Lorman explained that through such an API, a person can request access to a food truck's location information. A.307. Of course, many APIs remain closed, thereby limiting who can get access. But because Chicago mandated that service providers' APIs be "publicly accessible," Lorman testified that "[he] could [not] deny access to that API to people requesting it." A.403. That means that, even if a food-truck operator "didn't want [their] data to be available through [his] API," he could not restrict access to the truck's data "per the ordinance." A.406. And it turned out that, in at least one instance, Mr. Lorman acceded to a request for access. A.403.

The GPS requirement therefore requires LMP's location data be made available to whomever wishes it. And once that data has been accessed and retrieved, it can be used for any purpose, including rebroadcasting it to the world. This is intentional; as the Mayor stated, "[d]ata on food truck locations will be *available online to the public*. Food truck operators will be required to use mounted GPS devices in each truck so that the City *and consumers can follow their locations*." A.117 (emphases added).

But giving everyone this broad level of access does not further any government interest. If Chicago wants GPS data for field inspections, only its sanitarians would need access to that data. The same is true for using GPS to help enforce the 200-foot rule. But instead, Chicago mandates that

the public be able to both track Cupcakes for Courage in real time and look up everywhere it has operated over the past six months. As Laura noted, this causes her great concern due to the fact that her employees have previously been the victims of unwanted attention by customers and others. A.215. In giving the public carte blanche to peer into Cupcakes for Courage's movements, the GPS requirement violates Article I, Section 6.

CONCLUSION

For the foregoing reasons, LMP Services, Inc. respectfully requests that this Court reverse the appellate court's ruling and hold that Chicago's 200-foot rule and GPS tracking requirement violate Article I, Section 2 and Article I, Section 6 of the Illinois Constitution, respectively.

Dated: August 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and the Appendix, is 14,865 words.

/s/ Robert P. Frommer

CERTIFICATE OF SERVICE

The undersigned certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on August 20, 2018, a copy of the foregoing **Brief of Plaintiff-Appellant LMP Services, Inc.** and the attached **Appendix of Plaintiff-Appellant LMP Services, Inc. Volumes I and II** were filed and served upon the Clerk of the Illinois Supreme Court via the efileIL system through an approved electronic filing service provider and was served on counsel of record below in the manner indicated:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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